No. 9193

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. G. WHITE,

Appellant,

vs.

B. J. BRADNER, as Receiver for Lake View Oil and Refining Company, A. D. MITCHELL, and OIL WELL SUPPLY COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLANT.

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JURISDICTION OF THE DISTRICT COURT OF THE UNITED STATES.

The Statute of the United States affecting Sales by United States Courts, is the Act of March 3, 1893, ch. 225, sections 1, 2 and 3, 27 Stat. 751; 28 U. S. C. A. sections 847, 848 and 849.

JURISDICTION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Section 230 of the Judicial Code reads as follows:

"Time for making application for appeal. No appeal intended to bring any judgment or decree

> before a Circuit Court of Appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."
>
> *Federal Code Annotated,* Vol. 7, p. 772.

An order confirming a sale of real estate by a Receiver is appealable.

High on Receivers, 4th Edition, p. 232;
Sage v. Railroad Co., 96 U. S. 712 at p. 714.

PLEADINGS SHOWING THE EXISTENCE OF THE ABOVE JURISDICTIONS.

The Receivership action herein is known as Equity No. T-121-J in the District Court of the United States for the Southern District of California, Central Division, and entitled "Nora L. Powers, et al., Complainants, v. Lake View Oil and Refining Company, a corporation, Defendant". (R. p. 1.)

An order confirming the sale of the assets of the Receivership was made by the said District Court on the 27th day of December, 1938 (R. pp. 174-175), and thereafter a formal confirmation order was signed on January 20, 1939. (R. pp. 135-150.) The appellant, a stockholder of said Lake View Oil and Refining Company, had theretofore appeared at the hearing of the petition to confirm the sale and had entered written objections thereto. (R. pp. 160-163.) These objections were denied and exceptions reserved. (R. pp. 166-169.) Appellant likewise offered testimony as to the known present value of the properties

and the offer of testimony was refused. (R. pp. 163-169.)

Appellant's notice of appeal was filed March 29, 1939. (R. p. 153.)

STATEMENT OF CASE GIVING RISE TO THE PRESENT APPEAL.

At the hearing upon the petition for confirmation of the sale herein, the appellant duly entered a protest setting forth that the properties were being sold for a grossly inadequate consideration and that a current appraisement of the properties would show a material increase in value sufficient to pay all creditors and leave a substantial equity for the stockholders of the corporation. (R. p. 161.)

At said hearing appellant offered the testimony of a recognized petroleum engineer to the effect that since the last appraisement under the Receivership, the Pentland Lease had increased in known value, due to the discovery of deeper oil sands, to a sum in excess of $2,000,000. The Court ruled that appellant could make his offer, but that it was not going to change the Court's mind. (R. p. 167.) In this connection, the following testimony took place:

> "Mr. Wilson. May we offer testimony, your Honor, as to the value of the property of the Pentland Lease?
>
> The Court. If you wish to make a point of it, I will allow you to make your offer and have an exception to it. But it is not going to change my mind at the present time because these things have been advertised; * * *"

After some further remarks, the Court stated:

"If you wish to make an offer for the purpose of the record, the reporter may take it down, I will rule on it, and you have your exception.

Mr. Wilson. Thank you, your Honor. Mr. Suverkrop. * * *

The Court. What I mean just for the moment, counsel, is that you express yourself that you now produce a witness and that you offer to prove thus and so, and I will deny your right to do that, and that you will preserve your exception, without putting the witness on the stand. * * * (R. pp. 167-168.)

* * * * * * *

Mr. Wilson. There is present in the courtroom now Mr. Lew Suverkrop, a recognized petroleum and consulting engineer and geologist, for many years with the Department of the United States government, a man owning adjoining property, prepared to testify that within the past year other and deeper sands have been discovered in cross-sections adjoining this property, which definitely prove that there are deeper and better sands particularly on the Pentland Lease, from which any petroleum engineer would conclude that these properties—the Pentland Lease in particular along—has a reserve value of in excess of $2,000,000. * * * (R. p. 169.)

* * * * * * *

The Court. That the record may be complete in favor of the offering party, the offer which counsel now expresses and produces a witness asking that he be sworn, is refused by the Court and exception noted. Furthermore, the Court is of the opinion that the objections as expressed by other counsel should be sustained and they are

> sustained and exception will show in favor of the offering party." (R. p. 170.)

The objections as expressed by other counsel and sustained by the Court, were as follows:

> "Mr. Dechter. May I make an observation, your Honor, that this protest comes too late? (R. p. 168.)
>
> Mr. Rifkind. May it please the Court, at this time I would like to make an objection for the record upon the ground that the testimony prepared to be produced and offered is incompetent, irrelevant and immaterial; that the only purpose of this meeting is to confirm this sale or any higher bid and unless there is a higher bid there is no issue before this Court." (R. 169-170.)

Thereafter the sale of the Pentland Lease for $48,-500 to the Respondent A. D. Mitchell was confirmed. (R. p. 171.)

It thus appears that the Honorable District Court at the hearing on confirmation refused to hear any evidence as to the value of the properties sold because, as the Court stated, such evidence would not change the Court's mind (R. p. 169), and because the Court was of the opinion that the only purpose of the hearing upon the petition for confirmation was to confirm the sale or any higher bid. (R. pp. 169-170.) As is indicated by appellant's statement of points upon which he relies in this present appeal (R. p. 176) it is believed that the honorable District Court was in error as to the discretion allowed it upon a hearing of a Petition for confirmation of sale

and that either because of this mistaken view as to the limitations of its discretion or because of the fact that the Court's mind was already made up, appellant has been denied a substantial right to a fair consideration of his objections to the confirmation of the sale. Appellant likewise makes the point (R. p. 176) that the evidence herein reveals that the sale was confirmed for a grossly inadequate consideration—so gross as to shock the conscience of this Court.

ARGUMENT.

I.

THE SALE OF THE ASSETS HEREIN WAS FOR A GROSSLY INADEQUATE CONSIDERATION—SO GROSS AS TO SHOCK THE CONSCIENCE OF THE COURT. UNDER SUCH CIRCUMSTANCES, THE SALE SHOULD BE SET ASIDE.

Since the offer of proof was overruled, it is conceded by the Court that the facts embodied in the offer would have been proved by the witness had he been allowed to testify. Thus in a suit involving the validity of a will when an offer to prove certain facts was overruled, the upper Court on appeal, expressed the general rule as follows:

> "By overruling the offer, the Court, in effect, conceded that the witness, if permitted, could prove the facts embodied in it, and the only question open is whether such facts are relevant and material to the issue which the Jury have been sworn to try."
>
> *Griffith v. Venzinger* (Md.), 125 A. 512.

See also:

Norfolk, etc. R. R. Co. v. Fort Dearborn Co., 280 Fed. 264;

64 *C. J.* Sec. 155.

In view of the fact that the offer of proof was overruled, which offer must be taken as establishing the facts as to the value of the Pentland Lease, it appears that this Lease, having a value in excess of $2,000,000 was sold for $48,500, or less than one-fortieth (1/40) of its value. Clearly such gross inadequacy of price is sufficient to shock the conscience of the Court and the sale should be set aside.

A sale will be set aside because of inadequacy of price if the inadequacy is so gross as to shock the conscience of the Court.

Graffam v. Burgess, 117 U. S. 180, at 191-2;

In re Jewett & Sowers Oil Co., 86 Fed. (2d) 497 at 498;

Hungerford v. Owen Magnetic Motor Car Corp., 277 Fed. 244.

II.

WHERE RELIEF, LYING WITHIN THE SOUND DISCRETION OF THE COURT, IS REFUSED ON THE GROUND OF WANT OF POWER TO GRANT IT OR UPON ANY OTHER GROUND THAT PROVES THE NON-EXERCISE OF THAT DISCRETION, SUCH DECISION WILL BE REVERSED.

There can be no doubt but that the Court at the hearing on the Petition for Confirmation had the

discretion to set the sale aside, as long as this discretion was not exercised arbitrarily.

Stokes v. Williams, 226 Fed. 148;
Smith v. Hill, 5 Fed. (2d) 188.

But where, as in the present case, it appears that the Court wholly fails and refuses to exercise its discretion because of a supposed lack of authority, as is indicated by the fact that the Court sustained objections to the effect that the only purpose of the hearing on confirmation was to confirm the sale or any higher bid (R. pp. 169-170), or because of the fact, if it was a fact, that the Court's mind was already made up, as is indicated by the Court's statement that appellant could make an offer but it would not change the Court's mind (R. p. 167), it is shown that appellant has been denied his legal right to require the Court to entertain the question on its merits.

Maddox v. United States, 146 U. S. 140;
Herman v. American Bridge Co., 167 Fed. 930.

As stated in *Bowers on Judicial Discretion of Trial Courts,* Section 21:

> "It is not as a matter of benevolence that litigants are to receive due consideration of all rights that the law permits them to submit to the decision of the Courts; but the right is absolute and the inescapable duty rests upon the Courts to give that full and fair consideration to every claim of right that the parties may properly submit to them. So, when such a claim is presented, and in respect thereto, the duty of the Court to act upon it is clear, action must be taken, even though there is lodged in the decid-

ing Court a discretion as to what the decision will be. And if the Court fails to perceive this discretion, or, perceiving it, refuses to exercise it, the result is the same, for on appeal, reversal will occur, to the end that the party entitled thereto shall have his asserted right passed upon by the proper Court. Tersely stated: 'It is elementary that if relief lying within the sound discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the non-exercise of that discretion, such decision will be reversed, and the case remanded, with a direction to exercise the discretion. Seibert v. Minn. etc. R. Co. (Minn.), 57 N. W. 1068.''

CONCLUSION.

Since the offer of proof which was refused is tantamount to actual proof that the sale of the Pentland Lease was confirmed for a grossly inadequate price and less than one-fortieth (1/40) of its actual value, the sale should be set aside, or in the alternative, it being obvious that there has been a non-exercise of the Court's judicial discretion, the decision of the Court in confirming the sale should be reversed and the case remanded with a direction to exercise the discretion.

Dated, Oakland, California,
August 30, 1939.

Respectfully submitted,
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Attorney for Appellant.